CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF MEETING, Public Session

January 14, 2004

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Pam Karlan, Sheridan Downey and Thomas Knox were present.

1. Public Comment.

Caren Daniels-Meade, Chief of the Political Reform Division of the Secretary of State's office, announced that the SOS will be doing maintenance on their CalAccess website on Friday, January 16, 2004 and the website would not be available for filing during that time. She stated that it would be back up by Saturday, January 17, 2004.

Ms. Daniels-Meade reported that Monday, January 12, was a filing deadline, and 845 electronic filings were submitted that day, making the total for January through that date 2,079. She noted that more than 27,000 electronic filings were submitted to CalAccess in 2003.

Consent Calendar

Chairman Randolph asked that item #3 be pulled from the consent calendar.

Commissioner Karlan moved that the following items be approved on the consent calendar:

Item #2. Approval of the Minutes of the December 11, 2003, Commission Meeting.

Item #4. *In the Matter of Plaza Cleaning Service Company, L.P.*, FPPC No. 02/1044. (1 count.)

Item #5. *In the Matter of Merri Jean Ross*,FPPC No. 03/552. (1 count.)

Item #6. *In the Matter of Byron Wear*; FPPC No. 00/391. (3 counts.)

Item #7. *In the Matter of Suzanne Levoe*, FPPC No. 01/434. (2 counts.)

Item #8. *In the Matter of Robert McAdoo*, FPPC No. 02/369. (1 count.)

Item #9. *In the Matter of Robert Meyerson*, FPPC No. 02/596. (1 count.)

Item #10. *In the Matter of Gilbert Otero*, FPPC No. 02/691. (1 count.)

Item #11. *In the Matter of Michael Brooks*, FPPC No. 02/619. (1 count.)

Item #12. Failure to Timely File Major Donor Campaign Statements

a. *In the Matter of Kathy Levinson*, FPPC No. 2003-578. (2 counts.)
b. *In the Matter of J. Brian Thebault*, FPPC No. 2003-587. (1 count.)

Item #13. Failure to Timely File Late Contribution Reports – Proactive Program.

a. *In the Matter of John P. Manning*, FPPC No. 2003-823. (1 count.)
b. *In the Matter of Richard Del Piero*, FPPC No. 2003-839. (3 counts.)

Commissioner Knox seconded the motion.

There being no objection, the consent calendar was approved.

Item #14. Post Election Fundraising – Section 85316; Proposed Adoption of Emergency Amendment to Regulation 18531.6 and Adoption of Emergency Regulation 18531.61.

Commission Counsel C. Scott Tocher explained that Government Code section 85316 addresses generally post-election fundraising, and has two elements. It provides that a candidate may raise funds after an election only to the extent that the candidate has net debts after the election.

Mr. Tocher explained that the current regulation was a 2001 interpretation of the law providing that committees formed prior to the effective date of Proposition 34 for elections that occurred prior to the effective date of Proposition 34 may accept contributions regardless of whether the committee had net debt. Those contributions would not be subject to individual contributor limits. He noted that the 2001 interpretation became the subject of disagreement by a Superior Court Judge in *Johnson v. Bustamante.* The judge determined that the post-election fundraising limitation of § 85316 applied to the Lt. Governor's 2002 reelection committee, prohibiting Lt. Governor Bustamante from raising funds into that committee.

Mr. Tocher noted that the Commission recognized the importance of future experience under the regulation when they adopted regulation 18531.6. He explained that the Chairman at that time remarked that the regulation would likely end up in court. He pointed out that now, with the background of experience and the Superior Court ruling, the Commission could consider amending regulation 18531.6 and adopting a new regulation on an emergency basis. He stated that, if the Commission decided to apply the

limits to pre-Proposition 34 committees, then staff recommended adoption of the regulation changes and the new regulation described in the staff memo.

Commissioner Downey observed that both he and Commissioner Knox were on the Commission when the existing regulation was adopted. He explained that the Commission struggled with the decision at the time it was adopted, narrowing their concerns down to proper statutory interpretation and the practical impact/policy decisions that were at play. He recounted that the language of § 85316 led some of the Commissioners to question whether the drafters or voters had contemplated the application of the statute only to the post-Proposition 34 elections that had contribution limits. The panel concluded that there was ambiguity in the language, and Commissioner Downey still believed that the language was unclear.

Commissioner Downey stated that the Legislature enacted § 85321 in September of 2001, dealing with the removal of contribution limits for pre-Proposition 34 committees when those committees had net debt and were continuing to raise funds. He explained that the legislation superficially supported the Commission's decision in approving regulation 18531.6 at that time by exempting pre-Proposition 34 committees from an important aspect of the Proposition 34 contribution limits. However, that legislation seemed to suggest that the Legislature believed that pre-Proposition 34 comittees without net debt would not be engaging in fundraising at all because of the application of § 85316.

Commissioner Downey recalled that the Commission heard testimony from representatives of the Legislature and major parties, of individual Legislators, and certain statewide officeholders, who were all concerned that they would not be able to pay their officeholder expenses if they were not allowed to raise money into their pre-Proposition 34 committees. He explained that those officeholder expenses were substantial amounts. He explained that the Commission questioned whether the voters intended to cut off the primary source of funds that paid for those expenses, noting that the intent of the voters was an important consideration. He noted that drafters of the bill testified that they did not intend to cut off the primary source of funds for officeholder expenses.

Commissioner Downey explained how the Commission ultimately weighed the need of the Legislature to carry on its day-to-day business by raising funds into the old committees against the potential dangers defined in terms of the policies that were clearly enacted with Proposition 34. He explained that there were safeguards built into the regulations, observing that monies raised in excess of Proposition 34 limits could not be given to other Legislators or political parties in excess of the Proposition 34 limits. He noted that monies transferred to a committee for a new office for the same officeholder would be subject to the transfer and attribution requirements.

Commissioner Downey stated that the Commission considered the fact that the pre-Proposition 34 committees would be phased out and the problem would go away. He noted that, for the most part, the problem has gone away because most members of the current Legislature do not have pre-Proposition 34 committees. He discussed the current statewide officeholders, noting that some of them still have pre-Proposition 34

committees. As an example, he explained that Attorney General Bill Lockyer will be running for governor in 2006 and has already established a committee and transferred most of the money still left in his old committee to the governor committee. Mr. Downey explained that it is very expensive for a candidate to run for office, and that Mr. Lockyer will have to pay the travel expenses for himself and his family during the campaign, and probably cannot afford to pay for it out-of-pocket.

Commissioner Downey stated that the need to raise money for officeholder expenses still exists, but that the problem of how to raise that money appears insoluble. He explained that a post-Proposition 34 committee cannot raise money for officeholder expenses under § 85316, and can only raise money up to the amount of net debt for an election that has already occurred .

Commissioner Downey stated that the Legislature will have to fix the problem. He noted that a letter from Senate pro Tempore John Burton and Speaker Herb Wesson suggested that the Commission join them in providing a legislative solution for the issue of officeholder expenses. He observed that the Commission has been trying to get the Legislature to address the officeholder expense issue since before they adopted current regulation 18531.6.

Commissioner Downey explained that the vote on regulation 18531.6 was a close call by the Commission, and observed that the circumstances surrounding the issue have now changed. He stated that the Superior Court ruling pointed out that minds can differ on the issue. He believed that the Bustamante issue had nothing to do with the regulation adopted in 2001 because the issue in that matter was not that Bustamante raised money into an old committee, but that he raised money for one purpose and did not properly disclose that purpose or put the money in the right place.

Commissioner Downey supported adopting the staff recommendation and reversing the Commission's 2001 decision on the issue.

Jim Knox, representing California Common Cause, distributed a list of contributions made in excess of the Proposition 34 limits as a result of the current regulation. He encouraged the Commission to adopt the staff recommendation to change the regulation so that preexisting committees would no longer be exempt from the contribution limits of Proposition 34.

Mr. Knox noted that 44 states and hundreds of local jurisdictions have adopted contribution limits over the last three decades and none of them exempt a preexisting committee from contribution limits. He was pleased that the Commission was considering reversing that decision.

Mr. Knox cautioned the Commission against ignoring the problem because it would eventually go away. He believed that when the voters passed Proposition 34 they expected the contribution limits to go into effect for everyone in 2001, and not just for new candidates. He stated that the staff recommendation would at least stem the flow of

contributions that have been coming to candidates in excess of the Proposition 34 limits, noting that the *Bustamante* case was not an isolated incident. He noted that over 50 legislators have accepted legal contributions in excess of the limits, involving millions of dollars, and did not believe that it would slow down. He urged the Commission to put a stop to the loophole.

In response to a question, Mr. Knox stated that the contributions on the list he presented were all perfectly legal but should not have been allowed.

Chairman Randolph agreed with Commissioner Downey that the issue was not about the *Bustamante* case, and suggested that the Commission deal with it prospectively.

In response to a question, Chairman Randolph stated that she did not think that the language on line 10 and 11 of the proposed regulation should be changed to read, "There are no contribution limits in effect for elections held prior to January 1, 2001 if those contributions were made prior to January 24, 2004," because there are no limits on those contributions but they can only be accepted if the committee has net debt.

Commissioner Knox moved adoption of the amendment to regulation 18531.6 and adoption of proposed regulation 18531.61.

Commissioner Downey seconded the motion.

Commissioners Downey, Karlan, Knox and Chairman Randolph voted "aye." The motion carried by a vote of 4-0.

Item #15. Approval of Campaign Disclosure Manuals for State Candidates, Their Controlled Committees, and Committees Primarily Formed to Support or Oppose State Candidates (Manual 1), and for Local Candidates, Candidates for Superior Court, Their Controlled Committees, and Committees Primarily Formed to Support or Oppose Local Candidates (Manual 2).

Technical Assistance Division Chief Carla Wardlow requested approval of the proposed new campaign manuals for state and local candidates and their controlled committees. She explained that Technical Assistance Division worked very hard to put them together, and thanked staff members Kevin Moen, Sonia Rangel and Lynda Cassady for the many hours they put in on the project.

Chairman Randolph stated that she was very pleased to see the manuals.

Commissioner Downey stated that the manuals were terrific.

Commissioner Karlan moved that the manuals be approved.

Commissioner Knox seconded the motion.

Commissioners Downey, Karlan, Knox and Chairman Randolph voted "aye." The motion carried by a vote of 4-0.

Item #16. Issues Memo: Sections 85303 and 85310 –Expenditures by Candidate-Controlled Ballot Measure Committees.

Mr. Tocher explained that the staff memorandum explored communications identifying state candidates, and outlines the significant areas staff has identified for interpretation later in the year. He announced that an Interested Persons meeting will be scheduled for February, and invited the Commission to identify any concerns that staff could share at the meeting.

Mr. Tocher stated that the impact of these statutes became an issue during the recent recall election, but noted that there were many issues beyond candidate controlled committees that needed further study. He noted that page 4 of the staff memorandum outlined the elements of the statute and identified the significant areas staff believed needed to be addressed.

Mr. Tocher stated that § 85310(a) provides that persons who make payments of $50,000 or more for communications that clearly identify a candidate, but do not expressly advocate for that candidate's election or defeat, must file disclosure statements and reports regarding those communications. The language of § 85310(a) reaches communications and payments that are not otherwise disclosed under the Act. An important element will be determining when a candidate is "clearly identified" in an advertisement. He questioned whether the mere appearance of the candidate or the identification (required by the Act) in the advertisement should be considered as "clearly identifying" the candidate. Mr. Tocher noted that, since stating the name of a candidate has been considered as "clearly identifying" a candidate in another context of the PRA, an advertisement's PRA required committee identification could be considered "clearly identifying" under § 85310. He observed that every advertisement funded by a candidate controlled committee would then clearly identify the candidate.

In response to a question, General Counsel Luisa Menchaca stated that a candidate controlled ballot measure committee was not required to include the name of the candidate in the name of its committee, unless otherwise required by law. For example, the disclosure requirements of § 84107 are to be followed as are regulations adopted addressing advertisement disclosure identification requirements.

In response to a question, Mr. Tocher stated that § 84504 requires the candidate's name to be disclosed when the candidate has funded $50,000 or more of the advertisement costs.

Commissioner Blair joined the meeting at 10:29 a.m.

Mr. Tocher described § 85310(c), noting that it raised the question of whether a candidate can "behest" his or her own contributions. He explained that regulation 18225.7 defined

"at the behest" and that staff would explore whether that definition can be applied in this context, or whether the definition contemplates a two-party transaction. If so, that will determine whether the $25,000 limit would apply to a candidate's own controlled ballot measure committee. Mr. Tocher noted that this would implicate long-standing advice on the issue, which has stated that candidates can control ballot measure committees and that the contribution limits do not apply because it is a ballot measure committee. He anticipated that the question would involve constitutional issues, and that staff would have to explore the recent Supreme Court decisions for guidance.

Mr. Tocher explained that the memorandum also explored smaller issues, but pointed out that those issues could develop into bigger issues. He noted that the third element of subdivision (c) could be a bigger issue because it does not make clear whether the $25,000 applied to any individual contributor or if it is just for payments that are used to pay for the communications in which the candidate appears. If the latter is the case, Mr. Tocher stated that staff would have to develop accounting mechanisms to identify funds and determine whether limits have been evaded.

Mr. Tocher stated that staff would bring the issues back in a draft regulation for pre-notice discussion at the April 2004 meeting.

Commissioner Knox commended Mr. Tocher's memorandum. He stated his concern that a candidate controlled ballot measure committee could become a vehicle for skirting the campaign contribution laws. He understood that there was ambiguity in the "clearly identified" language, that the Commission has determined that a candidate cannot make a communication at the candidate's own behest, and that there may be constitutional issues. Nevertheless, Commissioner Knox believed, from a practical standpoint, that the Commission must be alert to the possibility that candidates may seize upon whatever opening the Commission may leave to create a measure committee and use it as a vehicle to circumvent the contribution limits. He stated that it could be particularly true in a climate where it is not unknown for a statewide candidate to try to qualify a measure for the ballot that would have a beneficial effect on that candidate's run for statewide office.

Chairman Randolph asked whether staff would be looking into the larger issue of whether the Commission has the authority to limit candidate controlled ballot measure committees in a broader sense. She noted that § 85310 does not address whether it is appropriate to allow candidates to control ballot measure committees.

Mr. Tocher responded that staff will look for public input regarding that concern and will present it to the Commission.

Chairman Randolph asked whether staff would be looking into the issue stated in footnote 3 on page 4 of the staff memo.

Mr. Tocher responded that the term "an election" may need to be defined in a regulation and that staff would be looking into it.

Commissioner Karlan asked whether there was an important legal distinction between "clearly identified" and "clearly identifiable." She presented an example of someone who runs an advertisement with a big picture of a candidate urging people to tell the official he is doing a bad job, without actually naming the candidate pictured. She asked whether the candidate would be considered "clearly identified."

Mr. Tocher responded that staff would need to explore that issue.

Commissioner Knox questioned whether, if a candidate states his or her name, but does not state that he or she is a candidate for office, the candidate has "identified" himself or herself.

Chairman Randolph responded that, under the current 18225.7, the candidate would be clearly identified.

In response to a question, Mr. Tocher stated that a candidate for statewide office who has a controlled ballot measure committee who includes the compelled disclosure on an advertisement as the only identification of the candidate in the advertisement would create constitutional and practical issues.

Commissioner Karlan pointed out that a candidate who states his name and his position on a ballot measure, but does not identify that he or she is a candidate for office, would not be "clearly identified" under regulation 18225(b)(1)(A).

Commissioner Knox stated that, if everyone knows who the candidate is, and the candidate buys time for the ballot measure advertisement as described by Commissioner Karlan, it would give the candidate a major benefit. He believed that should be considered during the staff discussions so that ballot measure committees do not become a loophole for candidates.

Commissioner Blair agreed.

Commissioner Karlan pointed out that, if the candidate's name is not expressly stated in the advertisement, the current regulation would not consider the candidate "clearly identified" because the candidate never expressly stated in the advertisement that he or she was a candidate.

Mr. Tocher responded that the law would regard someone as a candidate, regardless of whether they were identified as a candidate. Under regulation 18225(b)(1)(A), he noted, the candidate is clearly identified if the candidate's name is stated.

Chairman Randolph noted that it points out the larger issue of whether candidates should control ballot measure committees at all, noting that if the advertisement is made 46 days before the election no disclosure is necessary under § 85310. She believed that § 85310 does not necessarily address the concerns of the Commission.

Commissioner Downey commended Mr. Tocher on the thoroughness of the memorandum, noting that he expected a very animated discussion about the subject. He observed that § 85310 has to have some application, noting that there were very interesting issues surrounding it.

Mr. Tocher stated that staff will have to speculate as to how the courts will rule on the issue of ballot measure committees and their potential for misuse as a method of skirting the expenditure limits, noting that there is no federal equivalent of ballot measure committees. He explained that there are some cases that suggest that courts have indicated that they would entertain a limit where it can be shown that misuse would skirt an otherwise valid limit.

The Commission adjourned for a short break at 10:45 a.m.

The Commission reconvened at 10:56 a.m.

Item #3. Proposed ALJ Decision: *In the Matter of James Lotter*, FPPC #01/276.

Commission Counsel Elizabeth Conti explained that this was a single count case for failure to file a 2000 statement of economic interest by the April 2, 2001 due date. She explained that an administrative hearing was held on September 10, 2003 in front of Administrative Law Judge Muriel Evens and that the respondent had stipulated to all the facts. She pointed out that the respondent made a lengthy presentation to Judge Evens, who then allowed brief argument in support of each position.

Ms. Conti explained that the maximum penalty for this violation is $5,000, and that staff asked for a fine of $1,000 at the hearing, while the respondent believed that no penalty was appropriate. She pointed out that the penalty would have been $200 under the expedited process, but that the respondent chose not to participate in that process. Staff emphasized the seriousness of the violation at the hearing, noting that respondent had a lengthy history of timely filing.

Ms. Conti pointed out that Judge Evens noted that there was no evidence of any actual financial conflict nor that the respondent had engaged in any fraud or deceit. Additionally, the judge noted that this was the only violation against the respondent and that the violation did not result from financial wrongdoing. Judge Evens believed that a fine of $500 was enough to get Mr. Lotter's attention. Staff was satisfied with the proposed penalty and recommended that the Commission adopt the proposed ALJ decision and affirm the penalty.

Chairman Randolph explained that the Commission would consider the matter in closed session.

James Lotter stated that he did not disagree with any of the facts presented by Ms. Conti. However he did have two concerns. He believed that the proposed penalty had no rational basis. He explained that he insisted on the ALJ hearing because he had some

mitigating circumstances that needed to be heard. In doing this, he noted, the proposed penalty went from $200 to $1,000.

Mr. Lotter stated that Ms. Conti argued at the hearing that the penalty reflected time and trouble in investigating the case, and that Judge Evens stated that a fine of $500 should get his attention. Mr. Lotter stated that contact from FPPC investigator Bonnie Swaim got his attention, noting that he responded to her phone call within two days. Subsequent filings were made in a timely manner. He believed that he was being prosecuted selectively.

Mr. Lotter stated that the county claimed that they did not know that Mr. Lotter had resigned, but that he had a copy of a letter he sent to them advising them of his resignation 5 ½ months before his resignation date. Additionally, he reported that he received an SEI form 9 months after his resignation date from the county. He asked, if timely filing is so sacred to warrant such a high penalty, whether Mendocino county would be subject to a penalty since they did not notify him in a timely manner of his filing requirements. Mr. Lotter felt that things were disingenuous, and he referred the Commission to the briefs filed in the matter that outlined his mitigating circumstances.

Commissioner Knox stated that Mr. Lotter was not being fined for anything having to do with his leaving office statement.

Mr. Lotter agreed, noting that the penalty was related to his 2000 statement.

Commissioner Knox pointed out that Mr. Lotter's complaint was that, when he declined to accept the Commission's offer of a $200 penalty, he was subjected to a $500 penalty.

Mr. Lotter agreed, noting that he had circumstances that needed to be heard. He stated that the reason stated for the higher fine was time and trouble, but that it did not indicate any public benefit. He observed that the public benefit was that he may never serve in a position in government again because, as a volunteer, it was not worth it.

Commissioner Knox pointed out that it was a practice in both criminal and civil law that, when trying to negotiate a deal with a prospect of litigation, an early offer that is turned down is not still available if the prosecutor has to litigate the case. He did not believe that this was unfair. He asked Mr. Lotter what kind of fine he would consider rational.

Mr. Lotter responded that there should be a non-monetary consequence, such as banning him from serving in a public office for a specified amount of time.

Commissioner Knox responded that the law does not give the Commission that authority.

Mr. Lotter observed that the Commission adopts regulations.

Commissioner Knox responded that the Commission interprets the statutes adopted by the Legislature or the people, and that they cannot create another remedy.

Mr. Lotter stated that he served as a volunteer in his community for 11 years, and spent money in those efforts. He believed that he was getting "hammered."

Commissioner Knox asked if Mr. Lotter had a quarrel with the notion of volunteers filing conflict of interest statements, or that they had to be filed by a certain deadline, or that there should be consequences if the deadlines are not met.

Mr. Lotter stated that he did not quarrel with any of the concerns suggested by Commissioner Knox. His quarrel was with the mechanism of a "sledgehammer hitting the gnat." He also believed that Mendocino County should also be penalized for their failures.

In response to a question, Mr. Lotter stated that he felt that the spectrum of circumstances surrounding his violations created a situation where he failed to meet his filing obligations, but that the mitigating circumstances should have been given more consideration.

Commissioner Downey stated that the Commission finds filing of SEI's an important matter. He explained the history of the streamlined procedure, noting that the enforcement division would prefer to start the penalties at $500, but that the Commission offers the $200 penalty in an effort to save staff time and trouble. If the Commission were to do away with the streamlined procedure, he suggested a base penalty of $500. He advised Mr. Lotter that the $200 was a reduced level, but that Mr. Lotter chose not to accept it.

In response to a question, Ms. Conti explained that staff originally asked for a fine of $1,000, not $5,000 as noted in the proposed decision.

Item #17. Legislative Report.

Chairman Randolph pointed out that there were a couple of bills in the Legislature that the Commission has taken a position on, dealing with officeholder fundraising. She encouraged the Legislature to accept the language proposed by the FPPC and to pass the bills.

Item #18. Executive Director's Report.

Executive Director Mark Krausse introduced Stephanie Dougherty, new Executive Fellow to the FPPC.

Item #19. Litigation Report.

Ms. Menchaca reported that oral arguments in *FPPC v. Agua Caliente Band of Cahuilla Indians, and Does I-XX* are scheduled for February 18, 2004.

In response to a question, Ms. Menchaca stated that she did not know who would be on the panel.

In response to another question, Ms. Menchaca stated that the court would be hearing the *Agua* case only.

The Commission adjourned to closed session at 11:14 a.m.

The Commission reconvened at 11:45.

Chairman Randolph announced that the Commission voted to adopt the ALJ decision in its entirety with one correction to change the reference to $5,000 by the ALJ to $1,000.

The public session of the meeting adjourned at 11:46 a.m.

Dated: February 10, 2004.

Respectfully submitted,

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Sandra A. Johnson
Commission Assistant

Approved by:

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Chairman Randolph